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FILED
DEC 31 1959
JAMES R. BROWNING, Clerk

No. 528

# In the Supreme Court of the United States

October Term, 1959

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INTERSTATE COMMERCE COMMISSION, APPELLANT

*v.*

ARROW TRANSPORTATION COMPANY, ET AL.,
APPELLEES

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On Appeal From The United States District Court For The Northern District Of Alabama, Northwestern Division

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## BRIEF OF INTERSTATE COMMERCE COMMISSION, APPELLANT, IN OPPOSITION TO MOTION TO AFFIRM

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ROBERT W. GINNANE,
*General Counsel,*

ISAAC K. HAY,
*Associate General Counsel,*
*Interstate Commerce Commission,*
*Washington 25, D. C.*

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### STATEMENT

Pursuant to Rule 16, Paragraph 3, of the Revised Rules of this Court, the Interstate Commerce Commission, Appellant, files this Brief in opposition to the Motion to Affirm filed by the Appellees.

### ARGUMENT

The Appellees, in their Motion to Affirm (page 2) maintain that the present case "presents the

same basic issue that was decided by this Court in *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, *James McWilliams Blue Line* v. *United States*, 100 F. Supp. 66 (S.D.N.Y), aff'd., 342 U.S. 951, and *Dixie Carriers* v. *United States*, 351 U.S. 56 * * *". They then proceed to devote practically their entire argument (pp. 5-9) to a discussion of the cases cited, in an effort to establish similarity between the facts in those cases and the facts in this case.

We respectfully submit that the facts in the three cases cited are clearly distinguishable from those in the instant case, and that the decisions relied upon by the Appellants are wholly inapplicable here.

The facts in the *Dixie Carriers* case were succinctly summarized by this Court in its opinion as follows:

> *Appellants, who are water carriers, requested the competing railroads to establish a joint rail-barge rate* of $7.67 on sulphur from Galveston to Danville. The railroads refused. Appellants thereupon filed a complaint with the Interstate Commerce Commission alleging that the existing rail-barge rates on sulphur were excessive and unreasonable, that through rail-barge routes and joint rates with reasonable differentials below the all-rail rates should be established, and that the refusal of the railroads to establish such joint rates discriminated against the barges as connecting carriers in violation of the Transportation Act of 1940, 24 Stat. 379, 54 Stat. 898, as amended, 49 U.S.C. 1. *Appellants requested the Commission to establish a through rail-*

*barge route and a joint rate* and suggested that the joint rate be fixed at $7.67. Appellants proposed that the Danville railroads receive $2.26 as a division of that rate, calculated to be the same as they receive from the all-rail rate from Galveston to Danville. Under the proposed rate, the cost of rail-barge shipments from the mines to Danville would be $9.17 as compared with the all rail rate of $9.184. (Emphasis supplied)

Thus, in the *Dixie Carriers* case the barge lines expressly sought to have the Commission establish a through rail-barge route and joint rate under the provisions of section 307(d) of the Interstate Commerce Act (49 U.S.C. 907(d)), after the competing railroads had refused to do so. The Commission found that there had been no violation of section 3(4) of the Act, declined to establish the through route and joint rate, and dismissed the complaint. (291 I.C.C. 422). On appeal, this Court reversed the District Court, which had upheld the Commission's order.

In the present case the complaining water carrier does not seek the establishment of joint water-rail rates. It chooses to maintain its own independent full local rates for its portion of the service, and instead, attacks the rates for the rail portion of the service, seeking to have the latter placed on the basis of the divisions of revenue received by the rail carriers out of the joint through rail rates.

The Commission, in its report of March 19, 1958 (303 I.C.C. 463, 470-471), took note of this distinction, stating:

> There are distinctions between the facts and issues presented in the *Dixie Carriers* case and those in this proceeding. As noted, the complaining barge lines there sought joint barge-rail routes and rates under section 307 (d), which are not sought here. The barge lines there assumed the expense of the transfer of lading to rail cars and the tender of the cars to the rail line, where here the barge lines' responsibility ceases when the traffic reaches the ports, and they have no interest in establishing through routes and joint rates. * * * In addition, the establishment of a single through rate was sought in the *Dixie Carriers case*, while here it is asked that a blanket application of rates for segments of all-rail movements, performing a finely-balanced function in an extremely complex rate structure, be required also on ex-barge traffic.

In the *Mechling* case, the railroads, after having maintained for several years the same proportional rates on the rail movement from Chicago to the east of ex-barge grain as ex-rail grain, were permitted by the Commission to establish proportional rates on ex-rail grain three cents per 100 pounds lower than on ex-barge grain. This Court found the authorized differential discriminatory, in violation of section 3(1) of the Act, pointing out that there had been no finding that the higher rates on ex-barge grain were warranted by any circumstances connected with such transportation which did not exist with respect to the transportation of ex-rail grain. Thus, in the *Mechling* case there was a comparison

between ex-rail and ex-barge proportional rates. Here, no such proportional rates exist, and the Commission, in its report of March 19, 1958 (303 I.C.C. 463, 471) properly said:

> The second phase of the complaint attacks the local rail rates which apply on ex-barge grain from ports on the Tennessee River to points in the South. *Respecting this phase, section 3(4) is not in issue because no rail proportionals are published from those ports to the South.* (Emphasis supplied)

The *James McWilliams Blue Line* case also was concerned with the comparison of two proportional rates. In that case coal was moved from the mines to Hampton Roads ports by rail, thence by steamship to New England ports, and thence by rail or barge to interior destinations. The proportional rate of the originating railroad was less if the last segment of the movement was by rail than if it was by barge. This Court affirmed the decision of the District Court, which had held, contrary to the Commission, that the maintenance of the lower proportional rate on rail-ocean-rail coal than rail-ocean-barge coal was unlawful and violated section 2 of the Act.

Accordingly, the principles enunciated by this Court in the three cited cases have no application to the instant case for the reason that (1) the complaining barge line did not seek the establishment of through routes and joint rates with the respondent railroads, but chose instead to maintain its own local rates and have the rail rates established on the basis

of revenue received by the rail carriers out of the joint rates maintained with other rail carriers (303 I.C.C. 470, 471) and (2) there are no rail proportional rates published from the ports involved to the South affording a comparison of proportionals, but, on the other hand, the only comparison possible is that of a local rate with a division of a joint rate (303 I.C.C. 463, 471).

It is well established that it is the duty of the Commission to safeguard the interests of the shipping and consuming public as well as the carriers regulated by it. The difference in the circumstances of transportation affecting the rates on ex-barge grain as compared with the divisions of the joint rates applying on ex-rail grain, inheres in the extremely important fact that the present east-bound grain rate structure was designed and prescribed by the Commission for use in constructing through all-rail rates. Its purpose was not to discriminate against any mode of transportation, but to equalize the costs of transportation over the numerous routes from origin to destination, thus affording producers and processors an equal opportunity to compete for the existing markets, and to provide the general public with the lowest possible rates compatible with adequate transportation service. The effect of that prescribed rate structure, developed over many years of study and experimentation, has been highly beneficial, not only to the farmer and processor, but also to the general public. Grain rates have been stabilized under the present structure at the lowest level consistent with adequate transportation service."

As we have heretofore pointed out in our Jurisdictional Statement, previously filed, the final decision in this case will have a tremendous impact upon the rate structure as it applies to the transportation of grain from the surplus producing areas of the Southwest and West to the deficit areas of the South, one of the largest grain movements in the country.

## CONCLUSION

For the reasons stated above, and those set forth in our Jurisdictional Statement previously filed, this appellant submits that the questions presented by this appeal are so substantial as to warrant plenary consideration by this Court on the merits. The Motion to Affirm should be denied, probable jurisdiction should be noted, and the decision and judgment of the District Court should be reversed and set aside.

Respectfully submitted,

ROBERT W. GINNANE,
*General Counsel,*

ISAAC K. HAY,
*Associate General Counsel,*
*Interstate Commerce Commission,*
*Washington 25, D. C.*

Dated: December 31, 1959